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Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

DAVID G. DIMICK,

PETITIONER,

v.

PETER SCHIEDT,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

Your petitioner respectfully submits the following petition for writ of certiorari, and prays that the same may issue to review the order of the United States Circuit Court of Appeals for the First Circuit, entered April 20, 1934, reversing an order of the District Court of the United States for the District of Massachusetts entered April 14, 1933, in which the judge of the said District Court disposed of a certain motion for a new trial, filed by a plaintiff in an action for personal injuries, by ordering that if the defendant should file a stipulation consenting to an increase in the amount of damages as found by the jury, then the plaintiff's motion for a new trial was to be denied.

Statement.

The case of *Peter Schiedt, plaintiff*, v. *David G. Dimick, defendant,* No. 5144 on the Law Docket of the District Court of the United States for the District of Massachusetts, being a claim for injuries alleged to have been sustained while the plaintiff, as a pedestrian, was crossing a public highway in Medford, Massachusetts, was tried before a jury and a verdict returned March 28, 1933, for the plaintiff in the sum of $500.

On March 29, 1933, a motion for a new trial was filed by the plaintiff, setting forth the following reasons:

> "1. Because the verdict is against the evidence and the weight of the evidence.
> "2. Because the verdict is a compromise verdict and illegal.
> "3. Because the damages are inadequate."

On this motion the Court entered the following order:

> "April 14, 1933. McLellan, J. On the authority of *Gaffney* v. *Illingsworth,* 90 N. J. L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages."

On the 17th day of April, 1933, the following stipulation, consenting to increase in the amount of damages awarded, was filed:

> "In accordance with the order of court herein made, with regard to new trial, the defendant files this stipu-

lation, hereby consenting to an increase of one thousand dollars ($1,000) in the damages awarded, from the sum of five hundred dollars ($500) awarded by the jury to fifteen hundred dollars ($1,500)."

The plaintiff in the said action, on April 17, 1933, filed a claim of exception to the order of April 14, 1933.

September 11, 1933, judgment was entered in behalf of Peter Schiedt in the sum of $1540.75 damages and interest, together with costs of suit taxed at $40.75. The plaintiff filed a substitute bill of exceptions, which was filed and allowed August 22, 1933, and duly entered in the United States Circuit Court of Appeals for the First Circuit August 22, 1933. The plaintiff also filed a petition for appeal to the said Circuit Court on the 15th day of November, 1933, and an assignment of errors, setting forth in substance that the Court erred in its order of April 14, 1933.

The case was duly set down for argument in the Circuit Court and was there argued by counsel, and on April 20, 1934, the said Circuit Court ordered that, "the judgment of the District Court is reversed with costs and the case is remanded to that Court for further proceedings not inconsistent with this opinion." The said opinion of the Court was a divided opinion. Wilson and Morris, JJ., being the majority, and Morton, J., submitting the dissenting opinion.

The Question Presented.

The sole question here presented is whether a judge of the District Court has the power to make an order denying a plaintiff's motion for a new trial, based in substance upon inadequacy of damages, upon a stipulation for increase in the amount of damages having been filed by the defendant in an amount suggested by the Court.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred—

1. In holding that there was any requirement of the Seventh Amendment to the Federal Constitution preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

2. In holding that there was any requirement at common law preventing a Federal District Judge in a common-law action from denying a motion for new trial by the plaintiff on the ground of inadequate damages, provided that the defendant consents that judgment be entered for an additional sum fixed by the Court.

3. In holding that the action of the Federal District Judge in this case amounted to a re-examination of the facts.

Reasons Relied on for the Allowance of the Writ.

The case presents a question of practice in the Federal Courts of great importance both to the bench and to the bar which has not been passed upon by this Court. It can hardly be denied that the exercise of such power in the hands of a conscientious Court might, at times, "advance the cause of justice, end litigation and lessen the expense."

Wherefore your petitioner respectfully prays that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit be granted.

LEO M. HARLOW,
DAVID H. FULTON,
For Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1934.

No.

DAVID G. DIMICK,

PETITIONER,

v.

PETER SCHIEDT,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINION BELOW.

The opinion below is not yet reported.

II. JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III. THE QUESTION PRESENTED.

The petitioner feels that the question presented cannot be better expressed than in the language used by Morton, J.,

at page 51 of the record, where the learned judge spoke as follows:

> "The essential facts are simple. The plaintiff sued the defendant at law to recover damages for personal injuries, and obtained a verdict. He regarded the verdict as much too small, and moved to set it aside on the ground of inadequacy of damages. The trial judge made an order that, 'If the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500, as found by the jury, to $1,500, on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried de novo, both on the question of liability and damages.' The defendant filed the stipulation called for, and judgment was duly entered thereon.
>
> "The plaintiff has appealed, and contends: (1) that the District Judge exceeded his authority in giving the defendant the election to avoid a new trial by stipulating an increase in damages; (2) that the order should stand as one granting a new trial.
>
> "It is argued that the order was invalid, both at common law, and under the Seventh Amendment to the Constitution. The Seventh Amendment reads as follows:—
>
> " 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' "

The question, accordingly, is whether or not a trial Court, upon a motion for a new trial brought by a plaintiff who has

recovered damages, but is dissatisfied with the amount of the damages, can avoid the expenditure of time and money required by a new trial by entering an order in substance requiring the defendant to increase, voluntarily, the award made by the jury or submit to a new trial.

IV. The Statutes Involved.

As stated in the opinion of the Circuit Court, at page 45 of the record—

> "the only Federal Statute relating to new trials is Sec. 726 R. S. as amended by Chap. 48, 40 Stat. 1181, 28 U. S. C. A. Sec. 391, which provides that:
>
> "'All United States courts shall have power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.'"

The Seventh Amendment to the Constitution reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

V. Argument.

The net result of the judge's order was to deny the motion for new trial. The means by which he arrived at the result may or may not be of consequence, but the whole matter is wrapped up in the discretion of the Court. Even if it should be considered that this is a refusal on the part of the Court to set aside the verdict for failure to award substantial

damages, yet it remains an undecided question as to whether this Court will review such an act of the judge.

> "Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial Judge abused his discretion we have no occasion to determine."
>
> *Fairmount Glass Works* v. *Cub Fork Coal Co. et al.*, 287 U.S. 474, at 475.

The Circuit Court, in its opinion, at page 47, recognizes the advisability of adapting old forms to modern practice and life, and a reading of this opinion would seem to indicate that the Court finds itself not unwilling, but unable, to take a step which, perhaps, it might otherwise feel inclined to take. We have, in other words, a diversity of opinion among the justices, all, no doubt, feeling like the learned Lord Davey in *Watt* v. *Watt* (at page 53 of the Record), who did not "doubt that the power, if it exists, would be convenient and, in most cases, do substantial justice and save expense."

Without undue discussion of the merits, it would seem that any argument contrary to the procedure adopted by the District Court must necessarily be based on two propositions:

(*a*) that the Court by its order necessarily found that there was such inadequacy in the award of damages by the jury as to render its verdict a practical nullity in the eye of the law; and—

(*b*) that the order of the Court prejudiced the rights of the plaintiff.

The fact that the Court seeks to interfere with the award of damages by the jury is not necessarily a finding by the

Court that the verdict is vitiated by prejudice, fraud or wrongdoing. If that were so, then in every case where remittitur is ordered, it might be said that the Court had found the verdict an improper one and that it had found that the defendant did not have the trial guaranteed by the Constitution.

Remittitur, which has become fixed in the practice of the Court and is the opposite of the act of the judge in the present case, has been recognized as a proceeding sometimes resorted to for the practical reason of forestalling an appeal, as stated in *Denny* v. *Pironi,* 141 U.S. 121, at 126: "Remittiturs are used where the judgment has been accidentally ordered for a larger amount than was due, or occasionally to forestall an appeal." The Court, therefore, recognizes that the presence of an order for remittitur in a particular case may be based on practical considerations of bringing to an end expensive litigation, rather than necessarily meaning that the Court found improper action on the part of the jury. If an order for remittitur does not necessarily mean a finding of impropriety in the verdict, but may be entered "occasionally to forestall an appeal," an order such as the present may not necessarily mean that the Court finds that the plaintiff has failed to have the trial by jury provided by law, but may be entered for the practical reason of ending the litigation.

If remittitur can be used as a practical implement in the administration of justice, so as to "forestall an appeal or end expense," there seems to be no reason why the contrary method may not be adopted, as was done by the District Court, unless the rights of a plaintiff affected by such an order can be said to have been prejudiced.

The rights of the defendant in the District Court were not prejudiced in the true sense of the word.

The prevailing party in the District Court was really the defendant therein. The very act of the plaintiff in bringing

a motion for a new trial was an acknowledgment of the fact that the defendant had prevailed and it can hardly be said that the rights of the plaintiff were prejudiced when the defendant, prevailing party, was the one required to yield in part the advantage which had been gained in the trial. We have already called attention to the fact that the order may not necessarily mean that the plaintiff did not have his day in Court and trial by jury. The trial justice saw the parties and the witnesses, and, however one may speculate with regard to what may have been in his mind, there can be no true reproduction of the sentiments which actuated him in the exercise of his discretion.

Without at this time enlarging upon the foregoing considerations or attempting to discuss the case fully upon its merits, it would seem that sufficient appears in the case and in the two opinions filed below to recommend to this Honorable Court the importance of the question presented for determination.

It would seem that it might be a distinct advantage and a help in procedure before Federal Courts if the judge might have the same power of intelligent control over litigation in cases similar to the present, just as he has the recognized power of ordering remittiturs.

It is respectfully submitted that a writ should issue as prayed for, to the end that this Honorable Court may determine this important question of Federal practice.

Respectfully submitted,

LEO M. HARLOW,
DAVID H. FULTON,
For Petitioner.